

STATEMENT

OF

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FOR THE

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

AND THE

AMERICAN SOCIETY OF NEWSPAPER EDITORS

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT INFORMATION, JUSTICE & AGRICULTURE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
U.S. HOUSE OF REPRESENTATIVES

H.R. 5164
THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

MAY 10, 1984

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, MY NAME IS CHARLES ROWE AND I AM THE EDITOR AND CO-PUBLISHER OF THE FREE LANCE-STAR IN FREDERICKSBURG, VIRGINIA. I AM TESTIFYING TODAY ON BEHALF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS. WE APPRECIATE THE OPPORTUNITY TO SHARE OUR CONCERNS WITH YOU ABOUT THIS LEGISLATION TO EXEMPT CERTAIN OPERATIONAL FILES FROM THE SEARCH AND REVIEW PROVISIONS OF THE FREEDOM OF INFORMATION ACT.

THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION IS A NONPROFIT MEMBERSHIP CORPORATION ORGANIZED UNDER THE LAWS OF THE COMMONWEALTH OF VIRGINIA. ITS MEMBERSHIP CONSISTS OF NEARLY 1400 NEWSPAPERS ACCOUNTING FOR MORE THAN 90 PERCENT OF U.S. DAILY AND SUNDAY CIRCULATION. MANY NON-DAILY NEWSPAPERS ALSO ARE MEMBERS.

THE AMERICAN SOCIETY OF NEWSPAPER EDITORS IS A NATIONWIDE, PROFESSIONAL ORGANIZATION OF MORE THAN 850 MEN AND WOMEN WHO HOLD POSITIONS AS DIRECTING EDITORS OF DAILY NEWSPAPERS THROUGHOUT THE UNITED STATES.

MR. CHAIRMAN, LIKE YOU, THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AND THE AMERICAN SOCIETY OF NEWSPAPER EDITORS ARE FIRMLY COMMITTED TO THE EXISTING FREEDOM OF INFORMATION ACT (FOIA OR THE ACT). THROUGH FOIA, THE PRINCIPLES OF OPEN GOVERNMENT UPON WHICH THIS COUNTRY WAS FOUNDED BECOME A REALITY. THE ACT STANDS AS TANGIBLE PROOF THAT A FREE PEOPLE ARE ENTITLED TO INFORMATION ABOUT HOW THEIR GOVERNMENT OPERATES AND HOW ITS DECISIONS ARE MADE. WHEN PUBLISHERS AND EDITORS DEFEND FOIA, WE DO

SO NOT SOLELY IN OUR PERSONAL INTEREST, BUT IN THE INTERESTS OF OUR FREE SOCIETY AND ALL ITS INDIVIDUAL CITIZENS.

THERE IS AN IMPORTANT POINT WHICH MUST BE REMEMBERED IN LOOKING AT THE CENTRAL INTELLIGENCE AGENCY (CIA) AND ITS PROBLEMS WITH FoIA. THE EXISTING STATUTE CONTAINS THE EXCEPTIONS REQUIRED TO STRIKE THE DELICATE BALANCE BETWEEN OPENNESS IN GOVERNMENT AND THE NEED FOR A DEGREE OF SECRECY IN OUR INTELLIGENCE OPERATIONS. EXEMPTIONS 1 AND 3 OF FoIA, IN CONJUNCTION WITH SECTION 102(D)(3) OF THE NATIONAL SECURITY ACT OF 1947, PROTECT CLASSIFIED NATIONAL SECURITY INFORMATION AND INTELLIGENCE SOURCES AND METHODS FROM DISCLOSURE. COURTS HAVE GIVEN GREAT DEFERENCE TO THE CIA IN IMPLEMENTING THESE EXCEPTIONS.

MR. CHAIRMAN, OVER THE PAST FEW YEARS WE HAVE CAREFULLY FOLLOWED VARIOUS FoIA EXEMPTION PROPOSALS DEALING WITH THE CIA. WE STRONGLY OPPOSED A BLANKET EXEMPTION OF THE CIA FROM THE REQUIREMENTS OF FoIA. WE HAVE ALSO HAD SERIOUS RESERVATIONS CONCERNING THE PROVISIONS OF S 1324 WHICH WOULD EXEMPT CERTAIN CIA OPERATIONAL FILES FROM THE SEARCH AND REVIEW REQUIREMENTS OF FoIA. AT THE SAME TIME, I MUST POINT OUT THAT REPRESENTATIVES OF THE NEWSPAPER BUSINESS HAVE NOT REJECTED OUT OF HAND THE CIA'S PLEAS FOR RELIEF FROM FoIA SEARCH AND REVIEW REQUIREMENTS. OVER THE PAST FEW YEARS, WE HAVE MET SEVERAL TIMES WITH CIA OFFICIALS TO DEVELOP A DIALOGUE ON THIS ISSUE.

WITH RESPECT TO S 1324, WHICH PASSED THE SENATE NOV. 17, 1983, WE WERE CONCERNED THAT THE LEGISLATION COULD UNNECESSARILY DENY INFORMATION TO THE PUBLIC WHICH NOW IS AVAILABLE, AND WE

WERE NOT SATISFIED WITH REPORT LANGUAGE ON CIA EFFORTS TO ADDRESS THE BACKLOG OF FOIA REQUESTS. WE ALSO FAVORED A MUCH STRONGER JUDICIAL REVIEW PROVISION THAN WAS INCLUDED IN THE SENATE BILL.

I WOULD NOW LIKE TO ADDRESS THESE THREE CONCERNS IN THE CONTEXT OF HR 5164 AS REPORTED BY THE HOUSE PERMANENT SELECT INTELLIGENCE COMMITTEE.

UNDER THIS VERSION, CERTAIN OPERATIONAL FILES WILL BE EXEMPT FROM THE SEARCH AND REVIEW REQUIREMENTS OF FOIA. THE STATED RATIONALE FOR THIS EXEMPTION IS THAT THESE FILES ALMOST NEVER CONTAIN INFORMATION RELEASABLE UNDER THE ACT, AND THAT BY UNBURDENING THE CIA FROM LABORIOUS REVIEW REQUIREMENTS, THE AGENCY WILL BE ABLE TO CLEAN UP ITS BACKLOG AND GENERALLY GIVE MORE EXPEDITIOUS CONSIDERATION TO OTHER FOIA REQUESTS. THIS LEGISLATION GIVES THE CIA DIRECTOR THE RESPONSIBILITY TO DESIGNATE THE FILES COVERED BY THE EXEMPTION.

HOWEVER, THERE ARE TWO UNDERLYING PREMISES WHICH MUST WORK IN UNISON IF THE STATED ENDS ARE TO BE ACHIEVED. FIRST, WE MUST PLACE OUR FAITH AND TRUST IN THE CIA TO CAREFULLY EXECUTE ITS RESPONSIBILITIES IN ACCORDANCE WITH THE STATUTE. SECONDLY, WE MUST LOOK TO THE CONGRESS FOR STRINGENT OVERSIGHT TO GUARD THE PUBLIC INTEREST AGAINST EXCESSES BY THE AGENCY.

MR. CHAIRMAN, THE HISTORICAL RECORD OF THE CIA, MOST RECENTLY PUNCTUATED BY THE MINING OF THE NICARAGUAN HARBOR, BRINGS EACH OF THESE PREMISES INTO SERIOUS QUESTION. UNDER THE INTELLIGENCE OVERSIGHT ACT OF 1980, THE CIA IS TO KEEP THE HOUSE AND SENATE

INTELLIGENCE COMMITTEES "FULLY AND CURRENTLY INFORMED OF ALL INTELLIGENCE ACTIVITIES." NEVERTHELESS, THE CHAIRMAN OF THE SENATE SELECT INTELLIGENCE COMMITTEE AND SEVERAL OTHER MEMBERS OF THE COMMITTEE CLAIMED THEY WERE NOT ADEQUATELY INFORMED ABOUT CIA MINING OF A NICARAGUAN HARBOR. CLEARLY, THE QUESTION WHICH COMES TO MIND IS, "IF THE CIA DOES NOT MEET ITS RESPONSIBILITIES UNDER THE INTELLIGENCE OVERSIGHT ACT, CAN WE EXPECT IT TO RESPECT THE PARAMETERS OF THIS LEGISLATION?" AND FURTHER, "IF THE OVERSIGHT COMMITTEES ARE NOT BEING ADEQUATELY INFORMED OF CIA ACTIVITIES, HOW WILL THEY BE ABLE TO MONITOR EFFECTIVELY THE IMPLEMENTATION OF HR 5164?" THIS BILL PROVIDES THAT OPERATIONAL FILES CONCERNING THE SUBJECT MATTER OF AN OFFICIAL INVESTIGATION WILL NOT BE EXEMPT FROM FOIA SEARCH AND REVIEW. BUT CAN WE EXPECT SUCH AN INVESTIGATION EVER TO BE TRIGGERED IF THE INTELLIGENCE COMMITTEES ARE SHIELDED FROM INFORMATION ON IMPORTANT ACTIVITIES OF THE CIA?

MR. CHAIRMAN, IN TESTIMONY BEFORE THE HOUSE AND SENATE INTELLIGENCE COMMITTEES WE EMPHASIZED THE NEED FOR FREQUENT AND THOROUGH OVERSIGHT OF THE CIA'S IMPLEMENTATION OF THIS LEGISLATION. TODAY WE EMPHATICALLY REPEAT OUR CALL FOR SKEPTICAL OVERSIGHT. THE CIA, THROUGH THIS LEGISLATION, WILL BE VESTED WITH A GREAT DEAL OF POWER WHICH, IF MISUSED, COULD SUBVERT THE SPIRIT OF PUBLIC ACCESS TO INFORMATION.

THIS COMMITTEE SHOULD MONITOR CLASSIFICATION OF FILES TO ENSURE THAT THE EXEMPTIONS BUILT INTO THIS LEGISLATION - FOR REQUESTERS SEEKING INFORMATION CONCERNING THEMSELVES, COVERT ACTIONS AND INVESTIGATIONS FOR IMPROPRIETY OR ILLEGALITY - ARE ADHERED TO BY THE AGENCY.

FURTHER, THE CIA SHOULD BE STRICTLY ACCOUNTABLE TO THIS COMMITTEE FOR CLEAN UP OF THE BACKLOG AND DEVELOPMENT. IN TESTIMONY BEFORE THE HOUSE SELECT PERMANENT INTELLIGENCE COMMITTEE, JOHN McMAHON, DEPUTY DIRECTOR OF THE CIA, STATED THAT CURRENTLY THERE ARE "OPERATIONS" STAFFERS ASSIGNED TO FOIA REQUESTS, AND UPON PASSAGE OF THE LEGISLATION THESE STAFFERS WILL BE TRANSFERRED BACK TO THE OPERATIONS DIRECTORATE. WE WANT TO ENSURE THAT THE FOIA OFFICE IS ADEQUATELY STAFFED TO HANDLE FOIA REQUESTS. THE LEGISLATION SHOULD PROVIDE FOR ANNUAL REPORTS BY THE CIA TO THE HOUSE AND SENATE INTELLIGENCE COMMITTEES AND TO YOUR COMMITTEE ON THE HANDLING OF FOIA REQUESTS, INCLUDING THE EXISTENCE OF A BACKLOG, THE AVERAGE RESPONSE TIME TO A FOIA REQUEST, AND STAFFING LEVELS.

THIS COMMITTEE, TO SATISFY ITSELF THAT THE CIA IS KEEPING ITS PROMISES - BOTH AS TO THE BACKLOG AND THE FILE DESIGNATIONS - SHOULD BE WILLING TO HEAR FROM FOIA REQUESTERS WHO SERIOUSLY BELIEVE THE SPIRIT OF THIS BILL IS NOT BEING RESPECTED BY THE AGENCY.

WE ARE PLEASED WITH THE MUCH IMPROVED JUDICIAL REVIEW PROVISION CONTAINED IN HR 5164. WE VIEW DE NOVO JUDICIAL REVIEW AS A CORNERSTONE OF THE FREEDOM OF INFORMATION ACT. UNDER HR 5164, THE COURT WILL EXERCISE DE NOVO REVIEW OF THE AGENCY'S FILE DESIGNATION.

WHILE THIS LEGISLATION GENERALLY EXEMPTS OPERATIONAL FILES FROM FOIA SEARCH AND REVIEW THERE HAS BEEN AN ATTEMPT IN THE LEGISLATION TO CAREFULLY DELINEATE THE TYPE AND LOCATION OF FILES

WHICH FALL INTO THIS CATEGORY. THERE ARE EXCEPTIONS FOR FIRST PARTY REQUESTERS, COVERT ACTIONS AND OFFICIAL INVESTIGATIONS OF IMPROPRIETY.

UNFORTUNATELY, MR. CHAIRMAN, THE CONGRESS' EFFORT TO BALANCE THE PUBLIC'S NEED FOR INFORMATION WITH THE NEED TO KEEP NATIONAL DEFENSE SECRETS MAY ALL BE FOR NOUGHT GIVEN RECENT DEPARTMENT OF JUSTICE/OMB REGULATIONS. UNDER THESE REGULATIONS, ANY RECORDS EXEMPTED FROM DISCLOSURE UNDER THE PRIVACY ACT OF 1974 ARE ALSO EXEMPT FROM DISCLOSURE UNDER THE FREEDOM OF INFORMATION ACT. THIS IS A REVERSAL OF THE DEPARTMENT OF JUSTICE AND OMB'S POSITION WHICH IT HAS HELD SINCE PASSAGE OF THE PRIVACY ACT IN 1974. THE DEPARTMENT OF JUSTICE/OMB REGULATIONS ARE ALSO CONTRARY TO THE WELL REASONED OPINION OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN GREENTREE V. CUSTOMS SERVICE 674 FED 74 (D.C. CIRCUIT 1983). THE ISSUE IS ONE WHICH THE U.S. SUPREME COURT HAS DECIDED TO REVIEW.

UNDER SUBSECTIONS J AND K OF THE PRIVACY ACT, THE CIA HAS EXEMPTED RECORDS AND SYSTEMS OF RECORDS FROM DISCLOSURE. HOWEVER, FIRST AND THIRD PARTY REQUESTORS HAVE A RIGHT TO USE THE FOIA TO MAKE A REQUEST FOR THESE SAME RECORDS -- IN THIS CASE, EXEMPTIONS 1 AND 3 OF FOIA GOVERN THE DISCLOSURE OF INFORMATION. THESE EXEMPTIONS ARE LESS BROAD THAN THOSE AVAILABLE UNDER THE PRIVACY ACT.

THE EFFECT OF THE NEW OMB INTERPRETATION WOULD BE TO ALLOW AGENCIES SUCH AS THE CIA TO EXEMPT BROAD CATEGORIES OF RECORDS UNDER THE AUTHORITY OF THE PRIVACY ACT, THUS FORECLOSING FOIA

ACCESS BEYOND EVEN THE AUTHORITY OF THIS BILL. THIS WAS NOT THE INTENT OF CONGRESS WHEN IT PASSED THE PRIVACY ACT. SECTION 552A (B)(2) WAS SPECIFICALLY INSERTED INTO THE PRIVACY ACT IN ORDER TO PRESERVE THE PUBLIC'S RIGHTS UNDER FOIA.

MR. CHAIRMAN, WE RECOMMEND THAT THE JUSTICE/OMB INTERPRETATION OF THE RELATIONSHIP BETWEEN THE PRIVACY ACT AND FOIA BE OVERTURNED THROUGH LEGISLATION TO REFLECT THE ORIGINAL AND TRUE MEANING OF CONGRESS. WE BELIEVE THAT THIS BILL GOES FAR ENOUGH IN THE DIRECTION OF ACCORDING DISCRETION TO THE AGENCY IN FOIA AREA. WE DO NOT WANT THE CIA TO BE ABLE TO FORECLOSE ACCESS UNDER FOIA BY INVOKING THE BROAD PRIVACY ACT EXCEPTIONS.

CONCLUSION

OUR NATION'S NEWSPAPERS RECOGNIZE THE NEED FOR A DEGREE OF SECRECY IN OUR INTELLIGENCE OPERATIONS. BUT THIS NEED MUST NOT OVERSHADOW THE PRINCIPLE OF OPEN GOVERNMENT IN OUR FREE SOCIETY. AS JUSTICE BLACK STATED IN NEW YORK TIMES V. UNITED STATES, 403 U.S. 713, 724 (1971),

"SECRECY IN GOVERNMENT IS FUNDAMENTALLY ANTIDEMOCRATIC, PERPETUATING BUREAUCRATIC ERRORS. OPEN DEBATE AND DISCUSSION OF PUBLIC ISSUES ARE VITAL TO OUR NATIONAL HEALTH."

MR. CHAIRMAN, THIS COMMITTEE, AND IN PARTICULAR THIS SUBCOMMITTEE, HAS LEGISLATIVE RESPONSIBILITY FOR THE FREEDOM OF INFORMATION ACT. WE IN THE PRESS ARE VERY GRATEFUL FOR YOUR ONGOING

ROLE IN PROTECTING THE FOIA FROM ASSAULT. IF THE PENDING LEGISLATION IS TO BE ENACTED, WE ASK YOU TO EXERCISE CAREFUL VIGILANCE OVER THE CIA'S IMPLEMENTATION OF ITS PROVISIONS. THE PUBLIC RELIES ON YOU TO SAFEGUARD ITS RIGHT TO AN OPEN GOVERNMENT AND TO ASSURE THAT INFORMATION RELEASABLE UNDER CURRENT LAW REMAINS ACCESSIBLE.